

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-7121

(42083)

To be argued by
ELLEN KRAMER SAWYER

United States Court of Appeals
FOR THE SECOND CIRCUIT

MIRIAM WINTERS,

Plaintiff-Appellant,

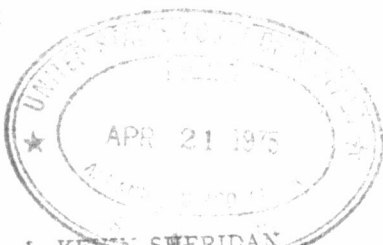
—against—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES
THOMAS AND OLLINS



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566-3321 or 566-4337

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—against—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. Blankfeld, Dusan Kosovic, Sandra Grant, Gerald Grant, Gerald Ollins, Christine Jordon, Thomas Da-Corta, and Catherine Dromgoole and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES
THOMAS AND OLLINS

Statement

The appellant herein appeals from an order of the Honorable ORRIN G. JUDD, United States District Judge for the Eastern District of New York, entered December 17, 1974, insofar as that order denied appellant's motion, pursuant to F.R. Civ. P. 60(b), to re-open the action, dismissed for failure of appellant's counsel to appear, as to defendants-appellees Miller, Thomas and Ollins (8a).^{*} Judge JUDD's order granted the motion to re-open as to the other defendants in the action. The defendant-appellee Thomas is presently Director of the Psychiatric Division, Bellevue Hospital Center; the defendant-appellee Ollins was a staff doctor at Bellevue Hospital at the time of the events that transpired in this case. Hence, these two defendants-appellees are represented by the undersigned.

Prior Proceedings

This action was originally brought by appellant for damages and injunctive relief under the federal civil rights statutes (42 U.S.C. §1983 and 28 U.S.C. §1343 [3]) against the Commissioner of Mental Hygiene, the Directors of Bellevue and Central Islip Hospitals and several staff doctors at those hospitals.^{**} The gravaman of the complaint was that appellant's constitutional rights were

^{*} All references unless otherwise noted are to the Joint Appendix.

^{**} In the original complaint, these staff doctors, one of whom is Dr. Ollins, were unnamed defendants. The record is bare of any allegation as to whether these doctors have now been served with a summons and complaint.

violated when she was forced to receive medical treatment over her objections, which were religious in nature, and to submit to being photographed and fingerprinted pursuant to Mental Hygiene Law §34(9-a). This cause of action alleging violation of appellant's religious beliefs was dismissed for failure to state a substantial federal claim upon which relief could be granted by order of the United States District Court for the Eastern District of New York (TRAVIA, J.), entered November 21, 1969. On all other claims of the complaint defendants were granted summary judgment.* Reported Below: 306 F. Supp. 1158.

On appeal, this Court by order entered May 26, 1971, reversed (one judge concurring in part and dissenting in part), holding that appellant had stated a cause of action by alleging she had been forced to take medicine despite her religious objections thereto. However, the remand order of this Court limited the issues for trial to further proceedings to assess appellant's claim for damages, presumably against specific defendants, resulting from forced medication in violation of appellant's right to freedom of religion under the First Amendment. See 466 F. 2d 65. The Supreme Court denied defendants' petition for certiorari. *Sub nom. Thomas v. Winters*, 404 U.S. 985 (1971).**

* The other contentions as to the constitutionality of Mental Hygiene Law §34(9-a) and the maintenance of this action as a class action, which both were rejected by J. TRAVIA and this Court, have apparently been abandoned by appellant.

** Three years later, this case came again before this Court on a tangential matter in preparation for trial concerning whether appellant could be forced to submit to a present physical and mental examination. In view of appellant's abandonment of claims that she suffered a present disability because of the 1968 treatment, this Court, reversing J. TRAVIA's oral order, held no such examination was required. *Winters v. Travia*, 495 F. 2d 839 (1974).

At some point, after all these proceedings, it became known that defendant-appellee Thomas, presently the Director of the Psychiatric Division, Bellevue Hospital, did not hold this position at any time during the period in May 1968 that appellant was a patient there. Subsequent to this discovery, appellant's counsel prepared and signed a stipulation, dated October 22, 1974, which drops Thomas as a defendant "for purposes of any money damages" but states that as to him "no other relief is hereby waived".*

Issue Presented

Was it an abuse of discretion for the District Judge, who had dismissed this action as to all defendants when appellant's counsel failed to appear on the trial date, to grant the motion to re-open the dismissal as to all the defendants except the three defendants-appellees herein, as to whom it now appears, as a matter of law, appellant has no cause of action?

Facts

(1)

The following underlying facts appear in appellant's papers before this Court in *Winters v. Miller*, 446 F. 2d 65 (1971):

Appellant, Miriam Winters, is a 59-year old spinster who has been supported under public assistance for over 10 years (37a).** For several years she had lived in a

* This stipulation was not actually signed by counsel for the three defendants-appellees herein until March 4, 1975.

** The following references are to the Appendix to Appellant's Brief to this Court in *Winters v. Miller*, 446 F. 2d 65 (1971).

hotel in Brooklyn, New York, and had created some difficulty there because of her constant demands that she be given a room with a private bath and her disruptive behavior, including the guarding of the public bathroom, and because of her failure to maintain a proper state of personal cleanliness (20a-21a, 37a).

In early 1967 she was told by her welfare case worker that she could obtain a room with a private bath with the approval of a physician or a psychiatrist (37a). Accordingly, at her request, she was seen by Dr. Robert Reich, a psychiatric consultant to the Department of Welfare (38a). Following this examination, Miss Winters was told that she would be given a room with a private bath if she would move to the King Edward Hotel in Manhattan, which she agreed to do, and in mid-April she took up residence there (38). On May 2, 1968, when Miss Winters attempted to pay her rent for that month, she was told by the hotel management that she could not continue to occupy the room she was in but would have to move (39a). This she refused to do. As a result, the hotel management summoned the police, and she was taken by them to Bellevue Hospital where she was involuntarily admitted (39a). This was pursuant to section 78(1) of the New York Mental Hygiene Law.

On May 7, 1968, appellant was examined by two staff psychiatrists at Bellevue who certified her need for care pursuant to section 72(1) of the New York Mental Hygiene Law, which provides for commitment for up to 60 days upon the filing of a "two physician certificate" (31a, 45a-47a).

For some period prior to her admission to Bellevue, appellant, according to her claim, had been a practicing Christian Scientist (17a-18a). When she was admitted she refused to allow a doctor to take her blood pressure (39a).

Nevertheless, she was given medication consisting of tranquilizers (both orally and intramuscularly), continually from the time of her admission until May 13, 1968, when she was transferred from Bellevue to Central Islip State Hospital on Long Island (8a).

The admitting physician at Bellevue, Dr. Blankfeld, examined appellant on May 2, 1968 (17a). She told him that she was "being framed by people at the head" (*id.*) and that, "They want to get me out of the room" (*id.*). Appellant also advised Dr. Blankfeld that she once had been admitted to Kings County Hospital, Psychiatric Division (*id.*).

Dr. Blankfeld stated that appellant "was evasive, guarded, suspicious and negativistic" (17a-18a). She "spoke under pressure, her communications were tangential, irrelevant and illogical. She had delusions of persecution and grandeur but denied hallucinations as well as suicidal and homicidal ideation" (18a). She was diagnosed by him as "Chronic Schizophrenic Reaction, Paranoid Type" (18a).

On the day of her admission, appellant was also seen by one of the Bellevue staff psychiatrists, Dr. Dusan Kosovic, who interviewed her extensively and reached the same diagnosis as had Dr. Blankfeld (18a).

There is no actual note in the Bellevue hospital record which would indicate that the patient made any statements to the effect of her being a Christian Scientist except a statement she made on the day of admission in the admitting office to one of the Bellevue social workers (18a, 22a).

On May 6, 1968, appellant was notified of her right to demand a hearing, and the Mental Health Information Service was also notified (31a). Thereafter, on May 7,

1968, Doctors Sandra Grant and Gerald Ollins completed their examination of appellant and issued a two physicians' certificate pursuant to Mental Hygiene Law § 72 certifying that plaintiff was mentally ill and a proper subject for care and treatment in an institution under the provisions of the Mental Hygiene Law (31a, 45a-47a). These physicians also certified as their diagnosis "CSR/Paranoid type" (Chronic Schizophrenic Reaction, Paranoid Type) (46a). They gave as their opinion that appellant showed a possible tendency to injure herself and also to injure others (*ibid.*).

At no time during her stay in Bellevue did appellant demand the hearing available to her pursuant to Mental Hygiene Law §72 (31a).

Appellant was at Bellevue from May 2, 1968, the date of her admission, to May 13, 1968, when she was transferred to Central Islip State Hospital and involuntarily committed there (8a).

Appellant was discharged from Central Islip Hospital on July 18, 1968 (9a, 32a). She has not since been hospitalized, being presently resident at the St. George Hotel, 51 Clark Street, Brooklyn (4a). The case, therefore, does not involve continued confinement or continued giving of medication. Appellant does not contest, and in fact concedes that she was legally and properly committed (*Winters v. Miller*, App. Br., pp. 17-18).

(2)

On appeal from the dismissal of her complaint under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3), this Court stated (*Winters v. Miller*, 446 F. 2d at p. 67):

"We reverse and remand for further proceedings as to the claim for damages resulting from the

forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment."

On June 5, 1974, a pre-trial conference was had before Judge JUDD. Dates for depositions of the parties were scheduled and the trial date was set for November 4, 1974 (6a-7a).^{*} However, the depositions had not yet been transcribed by that date (*id.*). On the morning of November 4, 1974, neither appellant's attorney or the attorney from the Attorney General's office appeared (7a). The attorney for the Corporation Counsel did appear (*id.*). Judge JUDD dismissed the action but indicated in oral argument that afternoon that he would entertain a motion to re-open (7a).

Thereafter, appellant made a motion pursuant to F.R. Civ. P. 60(b) to re-open the action on the ground that his non-appearance had been due to his misunderstanding that the trial had been rescheduled for a later date since the transcripts of the depositions were not yet ready (5a-7a). No papers were submitted in opposition to the motion. Following the hearing of the motion on December 13, 1974, Judge JUDD ordered, without opinion, that the cause of action be reinstated as to all the defendants except the three defendants-appellees herein (8a). There was no stenographer present at the hearing and, consequently, no record of the oral argument or the court's comments in reference thereto is available.

^{*} The next set of references is again to the Joint Appendix in this appeal.

ARGUMENT

The District Judge did not abuse his discretion by limiting the relief granted under F.R. Civ. P. 60(b) to reopening the action as to all defendants but the defendants-appellees herein, against whom appellant has stated no claim upon which relief may be granted.

(1)

The granting of relief from a final judgment under F.R. Civ. P. 60(b) is a matter committed to the discretion of the district court, the exercise of which will not be disturbed on appeal absent a showing of abuse. 7 MOORE'S Federal Practice §60.19; *Central Operating Co. v. Utility Workers of America, AFL-CIO*, 491 F.2d 245, 252 (4th Cir., 1974); *Universal Film Exchanges, Inc. v. Lust*, 479 F. 2d 573, 576 (4th Cir., 1973). The rule is clear that a successful 60(b) motion for relief from a summary or default judgment must be buttressed by the showing of a meritorious claim. *Central Operating Co. v. Utility Workers of America, AFL-CIO*, *supra*; *Universal Film Exchanges Inc. v. Lust*, *supra*; *Beshear v. Weinzapfel*, 474 F. 2d 127, 133 (7th Cir., 1973); *Design and Development, Inc. v. Vibromatic Mfg., Inc.*, 58 F.R.D. 71, 73 (E.D. Pa., 1973). There is no reason for not applying that rule here, where the district judge refused to re-open as to those defendants against whom appellant clearly has no meritorious claim upon which relief may be granted. We shall discuss briefly the various forms of relief sought in the complaint in relation to defendants-appellees Thomas and Ollins.*

* Although there are three defendants-appellees herein, the City's brief will deal with only its defendants, Doctors Thomas and Ollins.

(2)

Monetary Damages:

This action is predicated upon the Civil Rights Statute, 42 U.S.C. §1983, which imposes liability upon "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." However, it is clear that liability under these sections is personal and is to be directed *only against those particular individuals* who, acting under color of State law violated a plaintiff's constitutional rights. *Monroe v Pape*, 365 U.S. 167, 187-192 (1961). Further, as stated by this Court in *Johnson v. Glick*, 481 F. 2d 1028, 1034 (1973):

"The rule in this circuit is that when monetary damages are sought under §1983, the general doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required. Thus in *Martinez v. Mancusi*, *supra*, 443 F. 2d at 924, we conditioned a conclusion of liability of the warden on a finding that he was personally 'responsible for what the guards did.' Again, in *Wright v. McMann*, *supra*, 403 F. 2d at 134-135, in upholding a damage award as against Warden McMann, we stressed that 'there is every reason to believe that he was aware of segregation cell conditions,' and that 'such responsibility for permitting such condition to exist was ultimately, in any event, squarely his.' See also *Harty v. Rockefeller*, 338 F. Supp. 367 (S.D.N.Y. 1972); (Gurfein, J.). *Adams v. Pate*, 445 F. 2d 105, 107

& n. 2(7 Cir. 1971), and a dictum in *Dunham v. Crosby*, 435 F. 2d 1177, 1180 (1st Cir. 1970), are in accord. We reaffirm our position here"

Now, more than three years after this Court remanded this case for trial as to damages, appellant concedes that monetary damages cannot be recovered from defendant-appellee Thomas since he was not the Director of the Bellevue Psychiatric Service at any time during appellant's hospitalization (See Stipulation dated October 22, 1974).*

As to Dr. Ollins, appellant states that he "was one of the doctors at Bellevue, among others, whose name appears in Miss Winter's medical records" and then draws the bald conclusion that Dr. Ollins thereby "came in contact with her during the period that she was being forcibly medicated" (App. Br., p. 11). The record evidence shows the opposite to be true. Dr. Ollins' name appears no more than once in the hospital record, showing him only to have been one of the two physicians certifying that appellant was mentally ill and a proper subject for care and treatment in an institution under the provisions of the Mental Hygiene Law (pp. 31a, 45a-47a of Appendix to App. Br. in *Winters v. Miller*, 446 F.2d 65 [2d Cir., 1971]). The hospital record, which lists the names of the various doctors who saw appellant and prescribed medicine for her, expressly reveals that Dr. Ollins to k

* Despite appellant's disclaimer (App. Br., 8), this information, based on the stipulation, and not on the as yet untranscribed depositions, was before Judge Judd when he dismissed the action as to Thomas on November 4, 1974, and adhered to this decision on December 13, 1974. Clearly, this information was not before this Court or the Supreme Court when they rendered their decisions in 1971.

no part in prescribing or condoning the specific treatment accorded appellant, or even knew of the medication she was given. Moreover, it does not appear that Dr. Ollins occupied any supervisory position at the time. Thus, under the rule in this circuit there is no theory under which Dr. Ollins could be liable for monetary damages.

As Judge MOORE stated in his dissent to this Court's prior opinion (*Winters v. Miller*, 446 F. 2d at pp. 72-73):

"As to these three defendants, [Thomas, Miller and O'Neill] it is entirely clear that money damages are completely inappropriate since there is no showing whatever that they in any way condoned the administration of drugs to the plaintiff. It is not shown that any of them had any information whatever as to the beliefs held by Miss Winters, or for that matter the treatment being accorded to her. . . . Assuming, as the majority finds, plaintiff's constitutional rights were violated, an action under §1983 might be justified against the particular individuals who, acting under color of state law, unjustifiably violated plaintiff's constitutional rights. *Monroe v. Pape*, 365 U.S. 167 (1961). The named defendants were not such persons. . . . In fact not only was there no showing that these defendants were aware of the plaintiff's religious beliefs but also there was no showing that these defendants were in any way aware of the treatment afforded Miss Winters. . . . Therefore, there is no basis for granting damages to anyone currently before this court." *

* In the original complaint, which was the subject of consideration in *Winters v. Miller*, *supra*, 446 F.2d 65, Dr. Ollins was be-

Judge MOORE's opinion is all the more persuasive now that it is revealed that Dr. Thomas was not even a Director at Bellevue Hospital during the time involved and that there is no showing that Dr. Ollins, only a staff doctor at Bellevue, had any connection with the medication given appellant.

Other Relief:

Although appellant does not specify here the other relief she claims she is entitled to from Doctors Thomas and Ollins, we will assume from the original complaint that declaratory judgment and an injunction are meant.

We point out that appellant has apparently abandoned her claim that she is suing as a member of a class. Such claim was expressly rejected by Judge TRAVIA who stated that "The claim for the injections contrary to plaintiff's religious beliefs and wishes is a claim belonging to plaintiff alone, so that there is no class involved" (306 F. Supp. at p. 1171). Apparently accepting the ruling of Judge TRAVIA on this point, this Court declared it preferred to follow the lead of the Supreme Court by using an "ad

(Footnote continued from preceding page)

fore the Court only as an unnamed defendant, i.e., "doctors on the staff of Bellevue Hospital whose names are unknown to plaintiff." Dr. Ollins is now listed by name in the caption of this appeal. The record is bare of any allegation as to whether he has since been served with a summons and complaint. See Judge MOORE's comment in this regard that "None of the 'doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiffs' can be held by this court to be liable for damages since no such person or persons have been served" (446 F.2d at p. 73).

hoc" balancing test for resolving the complicated issues in this previously unlitigated area of the law and declined "to formulate any *per se* rules" and expressly indicated that its decision was limited to "the facts" of this "particular case" (446 F. 2d at p. 69). Additionally, appellant never makes clear what class she could possibly represent. If the class is Christian Scientists who are presently confined, she is not a member of the class. If the class is Christian Scientists who have been previously confined, there is no basis for seeking the declaratory or injunctive relief possibly sought here.

But class action or not, there is no justiciable issue at all to sustain a declaratory judgment. There is no existing controversy between appellant and Thomas and Ollins, except as to appellant's right to recover damages for their alleged past acts, which we have already discussed. As to injunctive relief, there is no threatened action by Thomas or Ollins which would form the basis for enjoining them from so acting. See *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Moreover, this Court's opinion remanding the case for trial expressly limited its order "for further proceedings as to the *claim for damages* resulting from the forced medication in violation of plaintiff's right to freedom of religion under the First Amendment" (446 F. 2d at p. 67) (emphasis ours). See also Judge Moore's dissent pointing out that (*id.* at p. 73):

"Furthermore, since Miss Winters is no longer under the control of any of the defendants, and there is no showing that she is likely to be brought under such control, it is clear that injunctive relief is also not in order. Similarly, declarative relief is inappropriate since there is no existing controversy."

(3)

Without distinguishing between monetary and other relief, appellant puts forth essentially two grounds for granting relief to her against Doctors Thomas and Ollins. The first argument is that the defendants-appellees herein cannot assert the defense of official immunity from a §1983 suit (App. Br., p. 9). It must be clear from our previous discussion that the defense advanced by Doctors Thomas and Ollins is not one of immunity but rather (1) lack of any personal involvement in or knowledge of the events in issue and (2) failure to show any continuing or threatened action by them against appellant which would justify an injunction or a declaratory judgment.

Second, appellant cites the case of *Dale v. Hahn*, 486 F. 2d 76 (2d Cir., 1973), *cert. den. sub nom. Miller v. Dale*, 95 S. Ct. 44 (1974), which was also handled by appellant's counsel here. The apparent purpose behind the citation is to show that Dr. Thomas may be subject to a declaratory injunction or an injunction "to insure that the First Amendment rights of his patients are protected" even though he did not hold his present position as Director of Bellevue's Psychiatric Division during the time of appellant's hospitalization (App. Br., p. 11). It is true that in *Dale v. Hahn, supra*, this Court upheld a complaint in a §1983 action where an incompetent sought damages from Dr. Miller, as the Commissioner of Mental Hygiene, and the Director of the State Mental Hospital, because this Court said more effective notice should have been given by the staff doctor who signed an application for the appointment of a committee of the incompetent, despite the fact that Dr. Miller, the present Commissioner, did not even hold such office at the time of the appointment. What appellant's counsel does not

report to this Court now is that upon rehearing in that case, when this Court specifically looked into the issue of whether in these circumstances the Commissioner could be held personally liable under §1983, appellant's counsel advanced the argument, accepted by this Court, that Dr. Miller was appointed as Commissioner more than a year before the appointment of a *successor* committee for the incompetent and so could be held liable for the sums appropriated and expended by the successor committee. See *Dale v. Hahn*, 2d Cir. Docket Nos. 73-1975, 73-1934 Nov. 21, 1973 and Jan. 9, 1974; see also Pltf's Br., pp. 8-10, and this Court's earlier order of April 5, 1971 stating that "... it may be that the appointment of the successor committee is a basis for his [Dr. Miller's] liability."

In sum, the District Judge properly denied reinstatement of the action as to Doctors Thomas and Ollins since appellant advances absolutely no claim upon which relief may be granted as to them.

CONCLUSION

The order appealed from, insofar as it concerns and affects the defendants-appellees Thomas and Ollins, should be affirmed, with costs.

April 16, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
*Attorney for Defendants-Appellees
Thomas and Ollins.*

L. KEVIN SHERIDAN,
ELLEN KRAMER SAWYER,
of Counsel.

Miller

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

Bruce Garner

being duly sworn, says, that on the 21 day of April, 19 75
at No. 240 1st Ave in the Borough of Man in The City of New York, he served three copies
of the annexed Brief upon Louis J. Lefkowitz Esq.,
the attorney for the Appelles in the within entitled action by delivering
three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
leaving the same with him.

Sworn to before me, this

day of

21
April, 19 75

Bruce Garner

David W. Fitchman

Form 321-1M-1100050

DAVID W. FITCHMAN

Notary Public, State of New York

24-1220610 Qualified in Kings Co.

Commission Expires March 30, 1977

Miller

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State of New York, County of New York, ss.:

being duly sworn, says, that on the 21 day of April, 19 75
at No. 2095 Bway in the Borough of MAN in The City of New York, he served three copies
of the annexed Brief of Defendant upon Legal Aid for the Esq.,
the attorney for the Elderly Poor in the within entitled action by delivering
three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
leaving the same with him.

Sworn to before me, this

day of

21
April, 19 75

David W. Fisher

David W. Fisher

Form 321-1M-1120058(57)

DAVID W. FISHER
Notary Public in and for the State of New York
24-12-11 Kings Co.

Commission Expires March 30, 1977

Miller.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

being duly sworn, says, that on the 21 day of April, 19 75,
at No. 84 5th Ave in the Borough of Man in The City of New York, he served three copies
of the annexed Baier upon NYC LU Esq.,
the attorney for the Defendant. in the within entitled action by delivering
three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
leaving the same with him.

Sworn to before me, this 21

day of April, 19 75

Curtis Brown
David W. Fishman
Notary Public, State of New York
24-1228610 Qualified in Kings Co.
Commission Expires March 30, 1977